Attempting to meet this burden, the Government asserted that the problem sought to be addressed was a threat of economic injury to free over-the-air television resulting from cable operators' refusal to carry broadcast signals. The Government reasoned that, without must-carry requirements, cable operators -- allegedly having an economic incentive to divert viewers from competitors for the sale of advertising -- had dropped and would continue to drop broadcast stations from their channel line-up; that television viewers usually stop watching over-the-air stations after subscribing to cable; that dropped stations would therefore see their audience (and their advertising revenue) shrink; and that, in the end, consumers unable or unwilling to subscribe to cable would therefore be left with fewer or less well-financed free over-the-air television signals to watch. See id. at 632-34, 646-47.

Though the Court agreed that Congress had enacted the must-carry statute on that reasoning, see id., the Court further required a showing "that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry." id. at 664-65. This, in turn, depended "on two essential propositions: (1) that unless cable operators are compelled to carry broadcast stations, significant numbers of broadcast stations will be refused carriage on cable systems; and (2) that the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether." Id. at 666 (plurality). Because there was

insufficient evidence to support these propositions, the case was remanded for further development of the record. Id. at 667-68 (plurality).

After remand, the Court narrowly sustained the statute by a five-to-four vote. In determining whether the problem sought to be addressed was "real," the Court felt constrained to accord extensive deference to congressional findings. See 117 S. Ct. at 1189. Thus, the Court phrased the question presented as not whether the asserted problem was real, but merely whether Congress could have found that it was real by "draw[ing] reasonable inferences based on substantial evidence." Id. (internal quotation marks omitted). The Court found that standard satisfied, holding that the record developed on remand contained substantial evidence to support predictions that, without must-carry, cable operators would drop substantial numbers of broadcast stations, see id. at 1190-95 (plurality); id. at 1204 (Breyer, J., concurring in part), thereby causing broadcasters significant injury, see id. at 1195-97.

Moving to the "tailoring" analysis, the Court found that the must-carry provisions did not burden substantially more speech than was necessary to further the governmental interests involved. See id. at 1198-99; id. at 1203 (Breyer, J., concurring in part). In particular, the Court determined that the burden imposed on cable operators was modest, stating that "cable operators nationwide carry 99.8 percent of the programming they carried before enactment of must-carry," and that "94.5

percent" of all cable systems had "not had to drop any programming in order tc fulfill their must-carry obligations." Id. at 1198.

The Court also determined that Congress could reasonably have found that alternative measures would not have been as effective. See id. at 1199-1203. In particular, the Court held that "Congress' decision that use of A/B switches was not a real alternative to must-carry was a reasonable one based on substantial evidence of technical shortcomings and lack of consumer acceptance." Id. at 1201. The Court based that conclusion on congressional findings in the 1992 Cable Act that, at that time, available A/B switches (inexpensive mechanical devices) suffered from technical flaws, were cumbersome to install and use, and were in fact rarely used by the television-viewing public. See id.[17]

2. Digital must-carry rules cannot be justified on a rationale relating to "access to free television programming for the 40 percent of Americans without cable." Turner I, 512 U.S. at 646. At the outset, the transition to digital broadcasting will ultimately require viewers to purchase expensive new TV sets or converters, which non-cable households are presumably least able to afford. Thus, the transition of digital television will hinder, not help, access to free over-the-air television. Having in that sense sacrificed the interests of non-cable households,

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[17]As explained below, current conditions differ from those existing in 1992. See infra, pp. 21-22.

the Commission cannot now credibly march under the banner of free over-the-air television.[18]

In any event, any prediction that digital must-carry requirements are "necessary to protect the viability of broadcast television," id. at 666 (plurality), would clearly be untenable at this time. The fundamental fact is that, if "the viability of broadcast television" was ever in danger, it has been secured by the requirement that cable operators carry broadcasters' analog signals.[19] If cable operators continue to carry analog signals during the transition period, they cannot divert broadcasters' audiences even if they refuse to carry digital broadcast signals. Thus, broadcasters will be able to reach the same number of cable subscribers (and to sell the same amount of advertising) whether or not their digital signals are carried on cable.

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[18]See, e.g., Quincy, 768 F.2d at 1455 ("If, in fact, the FCC has repudiated the . . . assumptions that underlie the must-carry rules, the suggestion that they serve an important governmental interest (or any interest at all) would be wholly unconvincing."); HBO, 567 F.2d at 40 (Commission may not rely on interest to uphold one measure where other FCC measure directly undercuts the same interest); Chesapeake & Potomac Tel. Co. v. United States, 830 F. Supp. 909, 929-32 (E.D. Va. 1993) (same), aff'd, 42 F.3d 181 (4th Cir. 1994), vacated and remanded on other grounds, 516 U.S. 415 (1996) (per curiam).

[19]Indeed, since the imposition of must-carry in 1993, the broadcast industry's fortunes have risen dramatically. From 1992 to 1996, television broadcast revenue from station operations has risen 22.74 percent in the top 50 markets for which data are available. See Exhibit F attached to these comments. In addition, sales of television stations, which totaled $1,441,205,936 in 1992, increased to $10,487,824,645 in 1996 and $7,246,180,330 in 1997. See id. The average station sale increased from $23,245,257 in 1992 to $105,937,623 in 1996 and $65,874,367 in 1997. See id. (Excluded from this analysis are top 50 markets for which data were not available for all years since 1992.)

A prediction that digital must-carry rules are nevertheless necessary to protect the viability of broadcast television must therefore rest upon an additional chain of predictions, the links of which must at a minimum include predictions that owners of digital TV sets will watch neither analog signals on cable nor digital signals off-air. Without those predictions, "access to free television programming for the 40 percent of Americans without cable" would clearly be secure: no station could possibly lose any advertising support.

But these additional predictions would be based on nothing more than speculation. First, any prediction that owners of digital TV sets will refuse to watch analog signals would be pure fancy, for content plainly influences viewing decisions at least as strongly as resolution. For example, it begs credulity to suggest that baseball fans will forgo watching their favorite team's games simply because the games are unavailable in digital format. This is particularly so because digital TV sets will enhance the resolution of even analog signals. See J. Brinkley, Defining Vision 430-31 (1998).

Second, the prediction that cable-subscribing owners of digital sets would not view digital signals off-air is untenable. After spending thousands of dollars on a digital TV set, consumers will obviously want to put it to good use; if this requires using input-selection switches and an antenna to receive digital signals off-air, they will. Unlike the installed base of analog TV sets the 1992 Congress had in mind when it made its

findings relating to A/B switches, digital TV sets will have electronic, remote-controlled, input-selection switches built in. See supra, pp. 7-8.[20] Just as DBS subscribers have for years, digital TV set owners will therefore find it easy and convenient to use an antenna to receive off-air digital signals. See id.[21]

In sum, the Commission could not credibly predict that requiring cable operators to carry digital signals during the transition period is necessary "to preserve access to free television programming for the 40 percent of Americans without cable." Indeed, one could just as plausibly predict that digital must-carry would impede that goal. For one thing, if it turns out that broadcasters will use their digital spectrum for purposes other than simulcasting their free over-the-air analog signal, cable carriage of digital signals may actually divert advertising dollars from (and thus weaken) the free over-the-air signal. For another thing, digital must-carry requirements may on some systems fill up the must-carry "cap" of Section

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[20]As this Commission has previously conceded, concerns about the efficacy of A/B switches "may become moot if television receivers begin to be manufactured with switching or interface devices built in." See Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, Report and Order, 1 FCC Rcd 864, ¶ 167 (1986).

[21]This is particularly true in light of "the superior performance characteristics of the ATSC DTV system," which allow for "DTV coverage that is equal or superior in coverage to today's NTSC service," Advanced Television Systems and Their Impact Upon The Existing Television Broadcast Service, Sixth Report and Order, 12 FCC Rcd 14,588, ¶ 87 (1997), and because the Commission has set aside legal restrictions on the use of antennas, see 47 C.F.R. § 1.4000.

614(b)(1)(B), 47 U.S.C. § 534(b)(1)(B), see Leddy Aff. ¶ 7, in which case analog signals might be replaced by digital signals, see 47 U.S.C. § 534(b)(2). Either way, non-cable households' access to free television programming might be harmed -- not helped.

3. Regardless, the Commission must establish that requiring cable operators to carry digital signals during the transition period would not "burden substantially more speech than is necessary to further the government's . . . interests." Turner I, 512 U.S. at 662.[22] It cannot do this: the burden imposed would dwarf that tolerated in Turner. When the requirement that cable operators carry analog broadcast signals went into effect in 1993, cable operators were already carrying most such signals voluntarily. See Turner II, 117 S. Ct. at 1198. Although this arguably showed that there was no real problem in the first place, the Court concluded from this fact that must-carry imposed only a modest burden. See id.

That reasoning has no application in the digital context. Today, cable operators are carrying no digital broadcast signals at all. See Chiddix Aff. ¶ 2. Imposing a digital must-carry requirement would thus roughly double the number of broadcast signals cable operators would be required to carry. See Leddy

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[22]Again, the burden will be on the Commission. See, e.g., Quincy, 768 F.2d at 1461 (Commission has an "affirmative obligation to show the requisite fit between means and ends") (internal quotation marks omitted); id. at 1463 ("the government must affirmatively demonstrate that the regulation is narrowly tailored to serve a substantial interest").

Aff. ¶¶ 6, 8. And if, absent legal compulsion, cable operators would not initially carry digital signals (the apparent assumption underlying a must-carry requirement), the net "burden of must-carry" would increase manifold. See Turner II, 117 S. Ct. at 1198 (noting that, although broadcast signals occupied more than 35,000 channels at the time, only 5880 channels involved signals that would not have been carried otherwise).

As the Commission recognizes, see NPRM ¶ 41, requiring cable operators to carry digital signals during the transition period would thus effect a massive intrusion upon cable operators' editorial discretion. And, as already explained, this intrusion would be made worse by the fact that adding a broadcast signal almost always means dropping a cable programming service. TWC's cable systems (and presumably those of most other cable operators) continue to lack vacant channels. See supra, p.9. Thus, sampled TWC systems would on average be forced to drop at least 10 non-broadcast signals. See id.

C. No Alternate Rationale Is Available.

The NPRM also hints that digital must-carry rules may promote "the successful introduction of digital broadcast television and the subsequent recovery of the vacated broadcast spectrum." NPRM ¶ 1. This rationale, too, appears to depend on a long chain of predictions, whose links must include at least predictions that, unless the Commission requires cable operators to carry digital signals during the transition period, consumers will have no digital signals to watch; that they will thus be

discouraged from purchasing expensive digital TV sets; that this will deter broadcasters from investing in digital transmitting equipment; and that this in turn will make it impossible to recapture analog spectrum for auctioning.[23]

But this "prime the pump" rationale has serious flaws even beyond those it shares with the Turner rationale. First, it is fundamentally implausible that, even considered in the abstract, an interest in bringing upscale consumers high-resolution television images is so "important" as to justify burdening constitutionally protected speech.[24] Similarly, even if one were to make the untenable assumption that an interest in generating revenue could ever outweigh free-speech rights, it could not do so here. Having previously given away digital spectrum for free, the Commission cannot now credibly argue that acquiring analog spectrum for auctioning is so important as to justify burdening constitutionally protected speech. See supra, p.20 n.18.

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[23]The Commission of course cannot rely on this rationale and the Turner rationale simultaneously: whereas the Turner rationale apparently depends on a prediction that there will be a quick proliferation of digital signals on cable (so that stations whose digital signal is not carried will lose viewers), this "prime the pump" rationale appears to depend on precisely the opposite prediction.

[24]See HBO, 567 F.2d at 34, 50 (interest in ensuring that pay TV services like HBO would play "supplemental role" vis-a-vis broadcast television -- which Commission advanced to justify rule prohibiting advertising on pay cable services -- was not "important" for purposes of O'Brien analysis); id. at 50 (expressing doubt that interest "in preventing delay of motion picture broadcasts could be shown to be important or substantial").

Second, the prediction that consumers' purchases of digital TV sets will stand or fall with a requirement that cable operators carry digital broadcast signals during the transition period assumes that cable operators would not carry digital signals without such a requirement. This assumption is clearly untenable.[25] Even if cable operators were to carry no digital broadcast signals at all, the sale of digital TV sets might be driven by digital programming of cable programming services. See supra, pp. 6-7. If consumers wish to receive digital signals, competition will assure that they will soon be able to receive it via cable and DBS. See id.[26]

III. REQUIRING CABLE OPERATORS TO CARRY DIGITAL SIGNALS DURING THE TRANSITION PERIOD WOULD AMOUNT TO AN UNAUTHORIZED TAKING OF PRIVATE PROPERTY.

Quite apart from the First Amendment problems, requiring cable operators to carry digital signals during the transition

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[25]The assumption is also directly contrary to Chairman Kennard's recent prediction that "[t]he transition to digital TV is inevitable." Remarks of William E. Kennard Before the Int'l Radio & Television Soc'y, New York, N.Y., Sept. 15, 1998. The Chairman so stated while suggesting that digital must-carry rules are not needed.

[26]Indeed, broadcasters -- particularly when clamoring for free spectrum -- have consistently predicted that they will be forced to convert to a digital format in response to introduction of digital signals on cable and DBS. See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, En Banc Hearing, MM Docket No. 87-268 (Dec. 12, 1995) (remarks of NBC's Neil Braun) (http://www.fcc.gov/Bureaus/Mass_Media/Informal/ilmm6001.txt); id. (remarks of ABC's Alan Braverman); Economic Considerations for Alternative Digital Television Standards, Panel Discussion (Nov. 1, 1996) (remarks of Jeffrey Rohlfs) (http://www.fcc.gov/Reports/ec961101.txt); J. Brinkley, Defining Vision 310 (1998) (remarks of NAB's Edward Fritts); id. at 370 (remarks of ABC's Thomas Murphy); id. at 415 (remarks of NBC's Robert Wright).

period would effect an unauthorized physical taking of private property. The Fifth Amendment permits Congress to take private property upon payment of proper compensation, and even permits it to delegate this eminent-domain power to administrative agencies like the FCC. But statutes may not be read to effect such a delegation unless they do so "in express terms or by necessary implication." Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540, 569 (1904); see also Regional Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974).[27] Because the Communications Act does not authorize the Commission to require cable operators to carry digital signals during the transition period at all (let alone "in express terms or by necessary implication"), the Commission may not impose such a requirement.

A. Requiring Cable Operators To Carry Digital Broadcast Channels Would Constitute a Per Se Physical Taking of Private Property.

It is well established that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); accord Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). Thus, in Loretto, the Court held that a law entitling cable operators to place cable wire and equipment on privately owned buildings was a

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[27] This clear-statement rule prevents the Executive Branch from encroaching upon Congress's appropriation power. See Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445 (D.C. Cir. 1994). Because the Tucker Act permits persons subjected to a taking to sue the Federal Government for compensation, an agency's takings will eventually be borne by the Federal Treasury. See id.; NBH Land Co. v. United States, 576 F.2d 317, 319-20 (Ct. Cl. 1978).

taking even though the equipment occupied only 1½ cubic feet of space, see Loretto, 458 U.S. at 438 n.16, and possibly increased (not decreased) the value of the properties involved, see Phillips v. Washington Legal Found., 118 S. Ct. 1925, 1933 (1998).

Requiring cable operators to transmit the signals of television broadcast stations amounts to a physical invasion of private rights. There can of course be no doubt that "[a] cable operator enjoys property rights in the cables in which he transmits his signal (as well, of course, as in the structures he uses to make the transmission)." Time Warner Entertainment Co. v. FCC, 105 F.3d 723, 725 (D.C. Cir. 1997) (Williams, J., dissenting from denial of reh'g en banc). And "the insertion of local stations' programs into a cable operator's line-up" is not "a metaphysical act," but "takes place on real property." Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting), vacated on other grounds, 512 U.S. 622 (1994). Thus, there is no reason to treat an occupation by electronic signals any different than an occupation by tangible objects. Cf. United States v. Morris, 928 F.2d 504, 511 (2d Cir.) (characterizing computer "hacking" as a form of trespass), cert. denied, 502 U.S. 817 (1991).[28]

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[28]Moreover, many cable operators will not be able to retransmit digital signals without purchasing and installing costly new equipment. See, e.g., NPRM ¶¶ 32, 92. In this respect, digital must-carry rules are indistinguishable from the "physical collocation" rules this Commission promulgated as part of its Expanded Interconnection rulemaking. See Bell Atlantic, 24 F.3d at 1445 (setting aside rules requiring local telephone

The Commission clearly can derive no comfort from any decision in the Turner litigation: neither the Supreme Court nor the district court there reached the merits of any takings issue. See Turner Broadcasting v. FCC, 910 F. Supp. 734, 750 (D.D.C. 1995) (dismissing takings claim without prejudice for jurisdictional reasons), aff'd, 117 S. Ct. 1174 (1997); see also 910 F. Supp. at 789 (Williams, J., dissenting) (finding it unnecessary to reach takings claim). Nor has the Supreme Court in any other case confronted a takings claim of this kind. See FCC v. Midwest Video Corp., 440 U.S. 689, 709 n.19 (1979) (finding it unnecessary to reach takings issue).

But in Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), aff'd, 440 U.S. 689 (1979), the Eighth Circuit held that a requirement that cable operators expand their channel capacity to accommodate public-access channels effected a taking. See 571 F.2d at 1058 ("a requirement that facilities be built and dedicated without compensation . . . would be a deprivation forbidden by the Fifth Amendment"). Digital must-carry requirements would be no different from the carriage requirements at issue in Midwest Video, and would therefore require the same result.

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companies to install in their central offices electronic equipment to facilitate interconnection with competitors' systems).

B. Absent Clear Authorization, the Commission May Not Require Cable Operators To Carry Digital Signals During the Transition Period.

Because the imposition of digital must-carry rules during the transition period would effect a taking of cable operators' private property, the Commission may not adopt such rules unless the Communications Act expressly authorizes the Commission to do so. It does not. As explained in Part IV of these comments, the only proper reading of the statute is that Congress did not intend digital signals to have any must-carry rights during the transition period. There is thus no clear statement authorizing rules affording must-carry rights to digital signals during the transition period, and the Commission must therefore refrain from promulgating such rules.

IV. THE FCC HAS NO STATUTORY AUTHORITY TO IMPOSE A REQUIREMENT FOR CARRIAGE OF TRANSITIONAL DIGITAL SIGNALS.

The Commission claims sweeping "broad authority" to define cable systems' digital must-carry requirements during the transition period from analog to digital signals.[29] This is simply not so. The Commission cannot alter Congress's clear and repeatedly expressed intent that the FCC not impose any obligations on cable systems to carry DTV signals until the transition from analog to digital has been completed and broadcasters have surrendered one of their two channels for auction.[30] No amount of statutory contortion (or any policy

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[29]NPRM ¶ 13.

[30]As it would be premature at this time, TWC does not address herein the legality of, or need for, digital must-carry

agenda) can obscure Congress's unambiguous conditioning in 1992 of any Commission action on DTV signal carriage requirements on the full conversion of analog signals to digital. Congress's subsequent references to the 1992 statutory language in legislation enacted in 1996 and 1997 only serve to reinforce the impenetrability of the FCC's jurisdictional barrier to digital must-carry requirements until all television stations are broadcasting exclusively digital signals and the analog spectrum has been returned. Any other conclusion contradicts plain statutory language and departs from fundamental principles of administrative law.

A. The Plain Language of Section 614(b)(4)(B) Allows the Commission To Require Carriage of Digital Signals Only After Signals "Have Been Changed" to DTV.

With the plain text of the 1992 Cable Act, Congress explicitly denied the Commission authority to require cable systems to carry digital local commercial broadcast television stations until each such station completes the transition from analog to digital and returns its second channel.[31] The text of the 1992 Cable Act could not be more clear on the Commission's

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rules after the transition. Rather, TWC merely confines the scope of its analysis in this proceeding to the (absence) of Commission jurisdiction to impose duplicative digital must-carry requirements on cable systems during the transition.

[31]Section 614(b)(4)(B) is expressly limited to local commercial stations, making no mention of non-commercial television stations. 47 U.S.C. § 534(b)(4)(B). There is no parallel provision in Section 615 dealing with carriage of non-commercial DTV signals. Therefore, the Commission has no jurisdiction over digital must-carry for non-commercial stations before, during, or after the DTV transition.

inability to impose digital must-carry obligations when cable systems are also required to carry the analog signal delivered by that same broadcaster. Section 614(b)(4)(B) provides as follows:

> (B) Advanced television -- At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

47 U.S.C. § 534(b)(4)(B) (emphasis added).

The plain meaning of Section 614(b)(4)(B)'s text, which, of course, binds the Commission's interpretation,[32] is that the event triggering any obligation that the Commission may impose on cable to carry DTV signals is the exclusive transmission of digital broadcast signals by broadcasters and the return of the analog spectrum.[33] Only those analog broadcast signals "which

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[32]It is a fundamental canon of statutory interpretation that the words of a statute are to be given their ordinary meaning. See, e.g., F. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947).

[33]As the language of Section 614(b)(4)(B) is unambiguous, "that is the end of the matter," and the Commission "must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Courts applying Chevron principles have been clear that the Commission may not expand its jurisdiction beyond limits established by Congress, even where it believes existing jurisdiction to be inadequate to accomplish its regulatory objectives. See, e.g., Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1519 (D.C. Cir. 1995) (holding that a proposed FCC policy of permitting nondominant common carriers to file tariffs with a range of rates, rather than fixed rates, violated the Communications Act); see also MCI Telecommunications Corp. v. AT&T, 512 U.S. 218 (1994) (holding that an FCC order making the filing of tariffs optional for nondominant interexchange carriers is not within the Commission's authority under the Communications Act).

have been changed" to meet the Commission's modified standards for digital television conceivably could be the subject of any Commission rule requiring cable operators to carry such DTV signals. During the transition period, all pre-existing local commercial television stations will continue to broadcast analog signals. Such stations will not be changed to conform to the new DTV standards until the transition has been completed. Conversely, transitional DTV signals will begin broadcasting in the digital format at their inception -- they will not be "changed" from analog to digital, they will always have been digital. Only upon the completion of the transition will any stations be changed from analog to digital, and only then can the Commission impose any DTV carriage obligations.

Obviously, Congress intended that DTV carriage during the transition period be left to the cable operators' discretion, rather than government regulation, particularly given that cable operators will be required to continue carrying analog signals during that period. Both the language of the 1992 Cable Act and related legislative history show that Congress did not delegate authority to the Commission to require cable operators to carry any digital signals broadcast by commercial television stations during the transition period.

B. The Legislative History of the 1992 Cable Act Confirms the Plain Text, Common Sense Interpretation of Section 614(b)(4)(B) as an Absolute Bar on Digital Must-Carry Until After the Transition Has Been Completed.

Although the plain language of the statute is entirely unambiguous, the legislative history to the 1992 Cable Act also

confirms that Congress never intended to grant the Commission authority to promulgate redundant digital must-carry rules while cable operators still bear analog must-carry burdens. For instance, the House Report's reference to "advanced television" essentially restates the statutory text:

> The issue of "advanced television" is addressed in subsection (b)(4)(B). The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.

H.R. Rep. No. 628, 102d Cong., 1st Sess. 94 (1992) (emphasis added) ("House Report"). The House Report provides clear confirmation that the text of Section 614(b)(4)(B) means exactly what it says: that only those signals that have been changed to digital could be eligible for must-carry status.

For its part, the Senate Report includes no language on which the Commission could fashion a jurisdictional basis for digital must-carry requirements during the transition.[34] Further, the Congress was clearly on notice that the Commission was planning a transition in which broadcasters would transmit both analog and digital signals, but still not a shred of evidence illustrating a congressional intent to impose simultaneous DTV and analog must-carry regimes can be found in

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[34]S. Rep. No. 92, 102d Cong., 1st Sess. 85 (1991) ("Senate Report").

the legislative history.[35] In sum, the only possible inference one can draw from these references is the patently obvious one: the Commission has no authority to require digital must-carry requirements as to broadcast signals which have not been changed to digital.

C. The Congressional Findings in the 1992 Cable Act Confirm That Congress Did Not Intend to Extend Must-Carry Rights to DTV Transition Signals.

In addition to the plain text and legislative history, Congress's findings in the 1992 Cable Act also demonstrate that Congress did not expressly contemplate mandatory carriage for broadcasters' DTV transition signals. Importantly, there is no finding that mentions, let alone justifies, requiring simultaneous carriage of both analog and DTV transition signals of the same local television licensee. Rather, the relevant findings reflect an underlying assumption that cable operators

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[35]By the time Congress passed the 1992 Cable Act, the Commission had been examining a transition of both digital and analog signals for five years in MM Docket No. 87-268. See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, Notice of Inquiry, 2 FCC Rcd 5125 (1987); Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, Tentative Decision and Further Notice of Inquiry, 3 FCC Rcd 6520 (1988); Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, First Report and Order, 5 FCC Rcd 5627 (1990); Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, Notice of Proposed Rulemaking, 6 FCC Rcd 7024 (1991); Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Second Report and Order/Further Notice of Proposed Rule Making, 7 FCC Rcd 3340 (1992); Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making, 7 FCC Rcd 6924 (1992).

will continue to be required to carry only analog signals during the DTV transition.

For example, the Commission can draw no support from finding (12) of the 1992 Cable Act to impose digital must-carry obligations during the transition. Section 2(a)(12) of the 1992 Cable Act provides:

> Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.[36]

As noted, Congress's identification of this interest in free, over-the-air television was critical to the Supreme Court's narrow affirmance of analog must-carry in Turner II.[37] Congress saw the analog must-carry regime as a mechanism to preserve the economic health of those broadcast stations, who supposedly required cable carriage and the associated advertising revenues, in order to remain solvent and, therefore, available at no cost to non-cable subscribers over the air. But the continuation of the analog must-carry rules during the transition ensures that these broadcast stations' advertising revenues will continue to make these stations accessible over the air during the transition. In fact, since it is extremely unlikely that the non-cable subscribers identified in finding (12) will incur the

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[36]Section 2(12) of the 1992 Cable Act.

[37]See supra, Part II-B.

expense of a new digital TV set, these individuals would be all but unaffected by a mandatory DTV carriage requirement during the transition. Therefore, finding (12) provides no justification for the Commission to impose digital must-carry obligations on cable operators during the transition period.

Similarly, finding (9) established that must-carry was unnecessary to serve the goal of the FCC allocations policy of providing fair, efficient, and equitable distribution of broadcast services:

> (9) The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.[38]

Because DTV frequencies have been allocated to existing TV stations in their current communities of license on a one-for-one basis, no community will obtain new principal service as a result. Consequently, the authorization of DTV service by existing licensees does not advance the goals of Section 307(b) of the Act.[39] The absence of cable carriage of DTV signals

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[38]Section 2(a)(9) of the 1992 Cable Act.

[39]The Commission has long held that an applicant for a broadcast television station license accrues no Section 307(b) preference if no new communities will be served. See, e.g., Applications of Washington's Christian Television Outreach, Inc., Decision, 99 FCC2d 395, ¶¶ 18-19 (1984) (holding that no Section 307(b) preference accrued to an applicant proposing local television for Arlington, Va., because it serves "essentially the same area" as Washington, D.C.); see also Applications of Cleveland Television Corp., Decision, 91 FCC2d 1129, ¶¶ 11-14 (1982) (holding that no Section 307(b) preference accrued to an applicant proposing service for Shaker Heights, Ohio, because it

during the transition thus will not undermine the goals of Section 307(b), since every qualified local commercial station will retain the right to demand carriage of its primary analog video signal.

Finally, finding (11) states that "[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate," and finding (16) states that, absent must-carry rights, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized."[40] Obviously, the analog must-carry provisions in the 1992 Cable Act assure that viewers will continue to have access to their traditional broadcast sources of local news and public affairs programming during the transition period. Similarly, the 1992 Cable Act has achieved Congress's goal of enhancing the economic fortunes of the broadcast industry.[41] However, a new must-carry requirement for additional digital signals would not advance the objectives identified in these findings. Therefore, under Congress's intent as expressed in the 1992 Cable Act, cable operators' decisions about whether and when to commence carriage of new, local DTV transmissions during the transition should be left to the sound

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was part of "one large 'community'. . . Metropolitan Cleveland").

[40]Section 2(a)(11), 2(a)(16) of the 1992 Cable Act.

[41]See supra, p.20, n.19.

business discretion of each operator and not be the subject of a mandate from the FCC.

D. Under Section 624(f)(1), the Commission Has No Authority To Impose Must-Carry Requirements Beyond Those Specified in the Statute.

In addition to the contrary plain text of Section 614(b)(4)(B), the Commission's claim of "broad authority" over digital must-carry during the transition period conflicts with another specific provision of the 1984 Cable Act and its own recognition in 1993 of "minimal" discretion over analog must-carry implementation. Section 624(f)(1) of the Communications Act, added by the 1984 Cable Act and which has not been amended, imposes an absolute restriction on the authority of "[a]ny Federal agency" to "impose requirements regarding the provision or content of cable services, except as expressly provided in [Title VI of the Communications Act]." 47 U.S.C. § 544(f)(1). Thus, Section 614(b)(4)(B)'s restriction on the Commission's jurisdictional reach makes good sense given the general command in Section 624(f)(1) that the Commission not impose any content-related requirements on cable operators beyond those expressly found in the statute. In sum, the statutory text of Section 614(b)(4)(B) is the only source of the Commission's authority to impose any such obligations, and it plainly says that cable systems can be required to carry only commercial broadcast stations "which have been changed" from analog to digital.

Indeed, the Commission itself recognized the narrow scope of its authority over signal carriage issues when it admitted in

1993 that "[t]he Cable Act of 1992 gives the Commission minimal discretion in implementing the general must-carry obligation provisions."[42] But now, in 1998, in spite of the direct language of Section 614(b)(4)(B), the Commission manages to find more latitude over the promulgation and implementation of digital must-carry requirements than it found in 1993 with respect to analog carriage rules. Given the plain language of Section 614(b)(4)(B) and its clear legislative history, the Commission's abrupt about-face in claiming "broad authority" to promulgate DTV must-carry rules cannot be sustained.[43]

E. Neither the 1996 Telecommunications Act Nor the Balanced Budget Act of 1997 Expanded the Commission's Authority To Adopt DTV Must-Carry Requirements Beyond the Narrow Scope of Section 614(b)(4)(B).

On two separate occasions, in the 1996 Telecommunications Act and the 1997 Balanced Budget Act, Congress specifically declined to revisit its 1992 decision to foreclose the possibility that the Commission could impose simultaneous analog and digital must-carry requirements on cable systems during the transition period.

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[42] Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Report and Order, 8 FCC Rcd 2965, ¶ 27 (1993).

[43] It is well-established that agencies must follow their own precedents or fully explain why they are departing from them. See, e.g., Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"), cert. denied, 403 U.S. 923 (1971); see also Atchison, T. & S.F. Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (holding that an agency has "a duty to explain its departure from prior norms").

1. 1996 Telecommunications Act.

The 1996 Telecommunications Act presented a perfect opportunity for Congress to modify the clear restriction in the 1992 Cable Act on the Commission's jurisdiction over carriage of digital signals. Indeed, the 1996 Telecommunications Act added an entire new Section 336 to the Communications Act dealing with numerous DTV issues. And, by 1996, Congress knew more about digital technology and the timing of the transition. Despite all that, Congress did nothing in a landmark revision of the Communications Act to change its earlier pronouncements on this issue; nor did Congress delegate any authority to the Commission to do so.

Indeed, where Congress spoke directly to must-carry requirements at all in the 1996 Telecommunications Act, it did so in a restrictive fashion. Section 336 gives the Commission licensing authority for "advanced television services," but specifically denies the Commission authority to promulgate must-carry regulations for "ancillary" or "supplementary" services transmitted by DTV signals.[44] The fact that the Commission expressly barred the Commission from requiring cable operators to carry any "ancillary" or "supplementary" services broadcast by DTV signals cannot be read to imply that Congress therefore intended for must-carry to apply to that portion of a DTV transition signal simulcasting much of the broadcaster's analog

[44] 47 U.S.C. § 336(b)(3) ("no ancillary or supplementary service shall have any rights to carriage under section [614] or [615]").